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the present case this onus has not been discharged by the respondent. I therefore concur in the order proposed.

BY THE COURT.—The order of the Court is that the appeal be allowed, the decree of the learned Judge of this Court and also of the lower appellate Court be set aside and the decree of the learned Munsif restored, with costs of this appeal, and also costs in the lower appellate Courts. We extend the time for the removal by the defendant respondent No. 1 of all the materials of the house up to the 15th of May next.

*Appeal decreed.*

## APPELLATE CIVIL.

1908
*April* 4.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.*

ABDUL KARIM KHAN (DEFENDANT) *v.* MAQBUL-UN-NISSA BEGAM (PLAINTIFF) AND MUHAMMAD RAZA KHAN AND ANOTHER (DEFENDANTS).*

*Act No. VII of* 1889 *(Succession Certificate Act), section* 4—*"Debt"—Deferred dower.*

*Held* that the dower of a Muhammadan wife, whether prompt or deferred, is a "debt" within the meaning of section 2 of the Succession Certificate Act, 1889, and that in a suit for its recovery brought by the heirs of the deceased wife against the husband no decree can be passed in favour of the plaintiff in the absence of the certificate required by the Act. *Nemdari Roy* v. *Mussummat Bissessari Kúmari* (1) dissented from. *Mahamed Ishaq* v. *Sheikh Akramul-Huq* (2) distinguished. *Webb* v. *Stenton* (3) referred to.

THE plaintiff in this case sued as one of the heirs of Musammat Qadri Begam, the deceased wife of Muhammad Abdul Karim Khan, to recover from the latter her share of the dower debt of Qadri Begam, fixing the amount at a lakh of rupees. The principal defendant resisted the suit upon various grounds; *inter alia* that the defendant had obtained no certificate of succession in respect of the estate of Qadri Begam and that the suit was barred by limitation. The Court of first instance (Subordinate Judge of Moradabad) decreed the plaintiff's claim. The defendant Abdul Karim Khan appealed to the High Court, again urging the two grounds mentioned above.

*First Appeal No. 154 of 1906, from a decree of Maula Bakhsh, Subordinate Judge of Moradabad, dated the 30th of March 1906.

(1) (1898) 2 C. W. N., 591. (2) (1907) 12 C. W. N., 84.
(3) (1883) L. R., 11 Q. B. D., 518, at p. 524.

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ABDUL KARIM KHAN v. MAQBUL-UN-NISSA BEGAM.

Mr. *B. E. O'Conor* and the Hon'ble Pandit *Sundar Lal*, for the appellant.

Pandit *Moti Lal Nehru*, Dr. *Tej Bahadur Sapru* and Pandit *Mohan Lal Nehru*, for the respondents.

STANLEY, C. J., and BURKITT, J.—This appeal arises out of a suit brought by the plaintiff, one of the two heirs of Musammat Kadri Begam, the deceased wife of the defendant, for her share of the deferred dower of Musammat Qadri Begam, which became due on her death. The Court below decreed the plaintiff's claim. Of the grounds of appeal only two were pressed before us, one being that the suit was barred by limitation and the other that without the production of a succession certificate the Court below was not justified in passing a decree.

As regards the question of limitation the allegation of the defendant is that Qadri Begam died on the 16th of September 1902, whereas the plaintiff says that she died on the 19th of that month. If she died on the earlier date, the suit, which was not instituted until the 18th of September 1905, is barred. We have carefully considered the evidence of the witnesses who were examined for the respective parties. This evidence is very conflicting. But upon full consideration of it we are quite unable to hold that the learned Subordinate Judge was wrong in the decision at which he arrived. He had the witnesses before him and was in a better position than we are to judge of the credit to be given to their testimony. The evidence of the plaintiff's witnesses is corroborated by an entry of the death in the register of deaths kept at the police station at Chowk at Rampur where Qadri Begam died. Sirajuddin proved this entry, and according to it Musammat Qadri Begam, in the register described as Qazmi Begam, a name by which she was also known, is stated to have died on the 19th September 1902.

The next question is as to the necessity for a certificate under Act VII of 1889. Section 4 of that Act prescribes that "no Court shall pass a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to the effects of the deceased person or to any part thereof * * * except on the production of (*i*) probate or letters of administration * * *

(*ii*) A certificate granted under section 36 or section 37 of the Administrator-General's Act, 1874 * * * or

(*iii*) A certificate granted under this Act and having the debt specified therein, or

(*iv*) A certificate granted under Act XXVII of 1860 * * * or

(*v*) A certificate granted under the Regulation of the Bombay Code No. VIII of 1827."

Sub-section 2 defines "debt" as including any debt, except rent, revenue or profits payable in respect of land used for agricultural purposes. Debt is therefore used in a very wide sense. The plaintiff has not produced probate, or letters of administration or a certificate as required by the Act. It is contended on her behalf that, inasmuch as the dower in respect of which she sues was deferred dower, it never was payable to Kadri Begam, and therefore her husband was not her debtor within the meaning of section 4. Reliance is placed upon two decisions of the Calcutta High Court as supporting this contention. The first is the case of *Nemdhari Roy* v. *Mussummat Bissessari Kumari* (1) in which it was held that the Succession Certificate Act referred only to debts for the recovery of which the deceased could sue, and that for debts falling due after death an heir may sue without a certificate. O'Kinealy, J., and Rampini, J., in their judgment observed:—"In law we know two kinds of debts; debts which have accrued due and debts not accruing (*sic*) due, but which will be due. Now the Succession Certificate Act refers only to such debts as the deceased could sue upon. The debt in this case has fallen due since the death of the deceased." The learned Judges do not give any reasons for so restricting the meaning of the word debt. We do not find any language in the Succession Certificate Act to bear out the statement that the Act refers only to debts for the recovery of which the deceased could have sued. The language of the Act is quite general and defines a debt within the meaning of section 4 as including "any debt except rent, revenue or profits * * *." Dower, whether prompt or deferred, is a debt due by the husband to the wife, but in the case

(1) (1898) 2 C. W. N., 594.

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of deferred dower is *debitum in praesenti solvendum in futuro.*

The next case is that of *Mâhamed Ishaq* v. *Sheikh Akram-ul-Haq* (1). In that case it was held that when a Muhammadan wife, who has not been divorced by her husband, dies during her husband's lifetime, the right to sue for her deferred dower accrues for the first time to her heirs and that the cause of action is not a joint one, but that any of the heirs may sue the husband separately for her share, but that in such a suit the presence of all the heirs is necessary in order effectually and completely to adjudicate upon the claims of the several heirs. We do not find in this case that any reference was made to the Succession Certificate Act. The necessity for the production of a certificate under that Act was apparently not considered.

Now the wife's right to dower, whether prompt or deferred, accrues as soon as her marriage is validly contracted. She can alienate it, pledge it, or make a free gift of it, either to her husband, or to her relations or to third parties. Mr. Ameer Ali in his "Personal Law of the Muhammadans" (2nd Edition, page 392) says:— "Dower is a debt, like all other liabilities of the husband, and has preference over legacies bequeathed by the testator and the rights of heirs. A partition of the estate cannot take place until the dower debt has been satisfied. When the wife is alive she can recover the debt herself from the estate of her deceased husband. If she be dead her representatives stand in her place and are entitled to recover the same." Dower in fact, whether it be prompt or deferred, is a debt due from the husband to the wife. If the dower be prompt, it is presently payable. If it be deferred it is payable in the case of death or divorce—a debt payable in future, but none the less a debt of the husband. It is a debt which accrued due on the completion of the marriage contract, but a debt payment of which is deferred." "The law," said Brett, M. R., "has always recognized as a debt two kinds of debt, a debt payable at the time, and a debt payable in the future." *Webb* v. *Stenton*, (2). Deferred dower is a debt payable in the future. We think therefore that the Court cannot pass any decree in favour of the plaintiff without the production of a

(1) (1907) 12 C. W. N., 84. (2) (1883) L. R., 11 Q. B. D., 518; at p. 524.

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succession certificate. But we also think that the plaintiff should have an opportunity, if so advised, of producing such certificate. Accordingly we shall defer passing a decree in this appeal for a period of two months so as to give an opportunity to the plaintiff of obtaining the necessary certificate. We accordingly adjourn the hearing of this appeal for two months.

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1908
*April* 6.

*Before Mr. Justice Sir William Burkitt and Mr. Justice Aikman.*

SAMIN HASAN (PLAINTIFF) *v.* PIRAN (DEFENDANT).*

*Civil Procedure Code, sections* 574 *and* 551—*Procedure—Appeal summarily dismissed—Court not bound to record a full judgment.*

*Held* that the provisions of section 574 of the Code of Civil Procedure are not applicable in their entirety to the case of an appeal dismissed under section 551 of the Code. *Rami Deka* v. *Brojo Nath Saikia* (1) dissented from.

THIS was a suit to recover damages for malicious prosecution. The defendant pleaded that the complaint which he had lodged in the Criminal Court was true. The Court of first instance (Subordinate Judge of Moradabad) dismissed the suit, finding that the plaintiff had failed to show that the complaint was groundless. The plaintiff appealed. The lower appellate Court (District Judge of Moradabad) sent for the record and fixed a date under section 551 of the Code of Civil Procedure. Upon that date the Court passed the following order:—"It is admitted that there was, and is, very strong enmity between the parties, and it is just as likely that the appellant had the respondent's house set on fire as that the fire was accidental. The learned Subordinate Judge was right in dismissing the suit. The appeal is summarily dismissed."

The plaintiff appealed to the High Court on the sole ground that the judgment of the Court below was not in compliance with the provisions of section 574 of the Code of Civil Procedure.

Dr. *Tej Bahadur Sapru*, for the appellant.

The respondent was not represented.

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* Second Appeal No. 336 of 1907 from a decree of D. R. Lyle, District Judge of Moradabad, dated the 12th of December 1906, confirming a decree of Maula Bakhsh, Subordinate Judge of Moradabad, dated the 25th of October 1906.

(1) (1907) I. L. R., 25 Calc., 97.

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SAMIN HASAN v. PIRAN.

BURKITT and AIKMAN, JJ.—The appellant brought a suit against the respondent claiming damages for malicious prosecution. The defendant pleaded that the complaint which he had lodged in the Criminal Court was true. The Court of first instance dismissed the suit finding that the plaintiff had failed to show that the complaint was groundless. The plaintiff appealed. The learned District Judge sent for the record, and, after hearing the appellant's pleader, dismissed the appeal summarily under section 551 of the Code of Civil Procedure, giving brief reasons for doing so and coming to the conclusion that the learned Subordinate Judge was right in dismissing the suit. The plaintiff comes here in second appeal.

It is urged that the judgment of the lower appellate Court does not comply with the requirements of section 574 of the Code. The learned advocate for the appellant relies on the decision of the Calcutta High Court in *Rami Deka* v. *Brojo Nath Saikia* (1) as an authority for holding that the provisions of section 574 of the Code apply to a judgment dismissing an appeal under section 551. With all deference to the learned Judges who decided that case, we are not prepared to hold that the provisions of section 574 are applicable in their entirety to the case of an appeal dismissed under section 551. We think this is evident from the immediately preceding sections, and in particular section 571. In the present case it appears that the learned Judge had the record before him and heard the appellant's pleader. There is nothing to show that he did not apply his mind to the facts of the case and the grounds taken before him. We dismiss the appeal, but without costs, as the respondent is not represented.

*Appeal dismissed.*

(1) (1897) I. L. R., 25 Calc., 97.

1908
*April* 24.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Karamat Husein.*

NANNHI JAN (DEFENDANT) v. BHURI (PLAINTIFF) AND KARAM ALI KHAN (DEFENDANT).*

*Civil Procedure Code, section* 283—*Suit for declaration of title by person whose objections to execution have been disallowed—Burden of proof.*

*Held* that a party intervening in the execution department, and failing in his objections to an attachment, and consequently being obliged to bring a suit under section 283 of the Code of Civil Procedure, must give *primâ facie* evidence to establish the genuineness of the document upon which he relies. *Tulshi Rai* v. *Ram Das* (1), *Afzal Begam* v. *Muhammad Obaidat-ullah Khan* (2), *Ram Nath* v. *Bindraban* (3) and *Govind Atmaram* v. *Santai* (4) followed. *Suba Bibi* v. *Balgobind Das* (5) discussed.

THE facts out of which this appeal arises are as follows. One Karam Ali Khan had two wives, namely, Musammat Bhuri and Musammat Nannhi Jan. Musammat Nannhi Jan on the 4th of August 1905 instituted a suit against her husband for the recovery of her dower, and on the 24th of November 1905 obtained a decree. On the 2nd of August 1905, that is, two days before the institution of Nannhi Jan's suit, Karam Ali Khan transferred to his wife Musammat Bhuri certain property, ostensibly in satisfaction of a portion of her dower debt. Musammat Nannhi Jan proceeded to execute her decree and attached the property which was transferred to Musammat Bhuri. Thereupon Musammat Bhuri filed an objection, but her objection was disallowed, and thereupon she instituted the suit out of which this appeal has arisen under section 283 of the Code of Civil Procedure.

The first Court (Subordinate Judge of Meerut) dismissed the suit, but upon appeal the District Judge reversed the decision of the Court below and decreed the plaintiff's claim.

The defendant thereupon appealed to the High Court.

Babu *Jogindro Nath Chaudhri* and Maulvi *Ghulam Mujtaba*, for the appellant.

Maulvi *Muhammad Ishaq*, for the respondents.

* Second Appeal No. 567 of 1907, from a decree of L. Stuart, District Judge of Meerut, dated the 23rd of March 1907, reversing a decree of H. David, Subordinate Judge of Meerut, dated the 17th of September 1906.

(1) Weekly Notes, 1887, p. 71.
(2) Weekly Notes, 1899, p. 220.
(3) (1896) I. L. R., 18 All., 369.
(4) (1887) I. L. R., 12 Bom., 270.
(5) (1886) I. L. R., 8 All., 178.

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NANNHI JAN v. BHURI.

STANLEY, C.J., and KARAMAT HUSEIN, J.—This appeal arises under the following circumstances. The defendant Karam Ali Khan had two wives, namely, Musammat Bhuri and Musammat Nannhi Jan. Musammat Nannhi Jan on the 4th August 1905 instituted a suit against her husband for the recovery of her dower, and on the 24th of November 1905 obtained a decree. On the 2nd of August 1905, that is, two days before the institution of Nannhi Jan's suit, Karam Ali Khan transferred to his wife Musammat Bhuri certain property ostensibly in satisfaction of a portion of her dower debt. Musammat Nannhi Jan proceeded to execute her decree and attached the property which was transferred to Musammat Bhuri. Thereupon Musammat Bhuri filed an objection, but her objection was disallowed, and thereupon she instituted the suit out of which this appeal has arisen under section 283 of the Code of Civil Procedure.

The first Court dismissed the suit, but upon appeal the learned District Judge reversed the decision of the Court below and decreed the plaintiff's claim.

The main question which has been discussed before us is whether or not the learned District Judge rightly laid the burden of proof on the defendant Musammat Nannhi Jan. According to his judgment he found, in agreement with the Court below, that the oral evidence was valueless, and held that the decision of the case turned on the amount of value to be placed upon the deed of sale in favour of Musammat Bhuri. Then he says:—"The burden of proof was upon the defendant respondent Musammat Nannhi Jan to prove that the deed had been executed fictitiously and collusively. She did absolutely nothing to satisfy this burden." And later on he observes:—"Musammat Nannhi Jan having absolutely failed to discharge the burden of proof on her to show that the sale deed was executed fraudulently, fictitiously and collusively, I find that the deed of sale in question is a genuine document." It is contended that the learned District Judge regarded the case from an entirely wrong standpoint and that the trial of the case was wholly unsatisfactory. The important fact to bear in mind is that Musammat Bhuri filed an objection to the attachment and to the sale of the property which had been transferred to her and that her objection had been

disallowed. In consequence of this it was necessary for her to institute the suit. It appears to us to be well settled, so far at all events as this Court is concerned, that a plaintiff coming into Court under such circumstances is bound to lay before the Court some evidence to satisfy the Court that the document under which she claims represents a *bonâ fide* and genuine transaction, and that the burden does not lie upon the defendant in the first instance to give evidence in proof of the fraudulent and collusive nature of such document. The learned District Judge appears to us to have laid the burden of proof upon the wrong party. In the case of *Tulshi Rai* v. *Ram Das* (1) Straight and Tyrrell, JJ., held that under similar circumstances the burden rested upon the plaintiffs who were impeaching the disallowance of their objection filed in the execution department to establish by clear and satisfactory proof that the property attached was their property at the date of the attachment and not the property of the judgment-debtor. This decision was followed in *Afzal Begam* v. *Muhammad Obaidat-ullah Khan* (2) and also in the case of *Ram Nath* v. *Bindraban* (3). It also has the support of the case of *Govind Atmaram* v. *Santai* (4), which is a case on all fours with the case before us. In that case Sargent, C.J. observes :—" The defendant had obtained an order maintaining his attachment, and it was incumbent upon the plaintiff who impugns that order by the present suit to prove her case. For this purpose it would be necessary for the plaintiff to prove the payment of the purchase money and that she had been since in possession." These cases establish the proposition that a party intervening, as the plaintiff did in this case, in the execution department and failing in his objections to an attachment and consequently being obliged to bring a suit under section 283 must give *primâ facie* evidence to establish the genuineness of the document upon which he relies. One case was quoted to us in which a different view was taken. That was the case of *Suba Bibi* v. *Balgobind Das* (5). In that case Straight and Brodhurst, JJ., laid the burden upon the defendant. This decision loses weight from the fact that in the later case Straight, J.,

(1) Weekly Notes, 1887, p. 71.
(2) Weekly Notes, 1899, p. 220.
(3) (1896) I. L. R., 18 All., 369.
(4) (1887) I. L. R., 12 Bom., 270.
(5) (1886) I. L. R., 8 All., 178.

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resiled from the position which he took up in it and took part in the decision of the case of *Ram Nath* v. *Bindraban*, which we have cited. Now the learned District Judge has considered the evidence from an entirely wrong standpoint, and it is impossible for us to accept his conclusion on the question whether the sale to the plaintiff was a real transaction or not, in view of the course adopted at the trial. We therefore, as was done in *Govind Atmaram* v. *Santai*, set aside the decree and remand the case to the lower appellate Court for re-trial. We accordingly remand the case with directions that it be replaced in the file of pending appeals in its proper number and be disposed of on the merits, regard being had to the directions which we have given above. The costs here and hitherto will abide the event.

*Appeal decreed and cause remanded.*

1908
*April* 30.

## FULL BENCH.

*Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Banerji and Mr. Justice Aikman.*

SULTAN BEGAM AND OTHERS (DEFENDANTS) *v.* DEBI PRASAD (PLAINTIFF).*

*Act No. IV of* 1893 *(Partition Act), section* 4—*Act No. IV of* 1882 *(Transfer of Property Act), section* 44—*"Undivided family"*—*Section* 4 *of Partition Act applicable to Muhammadans.*

*Held* that Muhammadans are not excluded from the benefit of section 4 of the Partition Act, Act No. IV of 1893. *Kalka Parshad* v. *Bankey Lall* (1) approved. *Amme Raham* v. *Zia Ahmad* (2) referred to. *Hashmat Ali* v. *Muhammad Umar* (3) overruled.

THIS case was referred by the Chief Justice to a Bench of three Judges for the decision of a point of law arising therein. The facts of the case and the nature of the legal question to be decided appear from the following order of the Bench before which the appeal came on for hearing :—

STANLEY, C.J., and BURKITT, J.—The only question now remaining for determination in this appeal is one as to the true construction of section 4 of the Partition Act, IV of 1893. The suit is one for partition of property situate in Cawnpore, which consists of an enclosed area on which stands an Imambara and

* First Appeal No. 92 of 1906 from a decree of Prag Das, Subordinate Judge of Cawnpore, dated the 2nd of January 1906.

(1) (1906) 9 Oudh Cases, 158. (2) (1890) I. L. R. 13 All., 282.
(3) (1907) I. L. R. 29 All., 308.